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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 19

THE FIRST NATIONAL BANK IN PLANT CITY,
Plant City, Florida, *Petitioner,*

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

No. 34

WILLIAM B. CAMP,
Comptroller of the Currency, *Petitioner,*

v.

FRED O. DICKINSON, JR.,
Comptroller of the State of Florida, et al.

PETITION FOR REHEARING

Petitioner The First National Bank in Plant City, Florida, prays that this Court grant rehearing of its decision and judgment of December 9, 1969, affirming the decision and judgment of the Court of Appeals for the Fifth Circuit in the above-entitled cases.

REASONS FOR GRANTING REHEARING AND REVERSING THE FIFTH CIRCUIT

In its December 9, 1969, opinion, this Court construed § 7(f) of the McFadden Act of 1927, 44 Stat. 1228-1229, 12 U.S.C. § 36(f), which defined a "branch" bank to include an additional office or branch place of business "at which deposits are received." The Court specifically rejected the argument that this section was to be interpreted according to state law and held instead that what constitues a branch is a matter of federal definition. The Court concluded that any place apart from the chartered premises where funds are regularly handed over to and received by an employee of the bank, or a receptacle of the bank, is a branch under § 36(f).

In reaching this result, the Court recognized "the right of the contracting parties to fix rights and risks as between themselves" (Slip opinion, p. 13) but refused to give weight to these contractual arrangements in applying the language of § 36(f) to the transactions at issue. In so denying the effectiveness of contracts freely entered into by banks and their customers and approved by the appropriate banking supervisor, the Court has brought about a situation which cannot fail to generate chaos in the world of banking.

In particular, there are two matters of extreme importance which have not been but now must be brought to the Court's attention in order to demonstrate the confusion and discord which may confidently be expected to flow from the Court's opinion. These matters were not heretofore argued to the Court, either at all or in sufficient detail, because the entire thrust of the Court of Appeals opinion and of at least some of those presenting opposing briefs was that Florida law

controlled and that all off-premises activity was to be defined as branching. Now, that the Court has rejected that argument but has nevertheless held the armored cars and receptacles involved here to be branch banks, it is vital that the Court understand the practical consequences that will flow from its ruling, unless reversed on rehearing.

One point is that the Court's definition will undoubtedly be applied to other statutory provisions dealing with the receipt of deposits and in so doing will bring about results which the Court could not possibly have intended. The other is that if armored cars and stationary receptacles are branches, a number of practical problems arise, even where branches are legal under state law, which make the branch system inoperable for national banks and thus put them at a competitive disadvantage.

1. While the Court in its opinion purported to interpret only § 36(f) of the McFadden Act, we respectfully submit that no reason whatever appears why similar references to the receipt of deposits by banks and other financial institutions in other statutory provisions should not receive the same interpretation accorded § 36(f). To put it another way, the lower federal courts—and, indeed, this Court—could hardly be expected to treat armored cars and receptacles as branches receiving deposits for purposes of § 36(f) and to treat these same transactions differently in determining whether—as is true of all other branches—the funds received are insured by the FDIC, are subject to the reserve requirements of the Federal Reserve Board, and are protected by the federal criminal statutes. The extraordinary consequence of treating such funds as deposits when they are received by the

bank's employee or receptacle is illustrated by the following:

"Deposits" in branches and main offices of banks are what the Federal Deposit Insurance Corporation (FDIC) insures and upon which its assessments are based. The Act defines "deposits" to include a wide variety of transactions and then provides that a branch is, in part, any place of business at which "deposits are received." 12 U.S.C. § 1813. In *FDIC* v. *Continental Illinois National Bank & Trust Co.*, 245 F.2d 567 (7th Cir.), *cert. denied,* 355 U.S. 877 (1957), the court was required to determine whether certain items should be considered as "deposits" under the statutory definition for purposes of determining FDIC assessments. The court held that where two banks maintain "reciprocal accounts," only the net balance of the accounts—that is, the amount by which B's deposit in A exceeded A's deposit in B—was a "deposit," because it was this amount which represented the true measure of the debtor-creditor relationship. 245 F.2d at 570-572. In the same case, the court refused to treat as a deposit a "reserve" set up by the bank when it purchased an installment contract from a seller of consumer goods; this "reserve" was a percentage of the contract price which was not available to be drawn upon by the seller-depositor until the installment purchaser had fully performed his contract. Since there was no debtor-creditor relationship (although one would arise if the purchaser paid his contract according to its terms), there could be no deposit. *Id.* at 574-576. On the other hand, the court treated as deposits money withheld from employees' salaries for income taxes, Social Security contributions, life insurance premiums and the purchase of Government securities,

since there was a debtor-creditor relationship created with respect to those funds. *Id.* at 576.

It is obvious that great variations in the amounts of FDIC assessments might be created by variations in the treatment of various items as deposits. Therefore any confusion as to the proper definition of a deposit would inevitably lead to a mass of litigation.

In addition, the coverage of FDIC deposit insurance might well be called into question, as well as the issue of when "deposit liability" is to take effect so as to bind the FDIC under 12 U.S.C. § 264. See *FDIC* v. *Deaton,* 105 F.2d 677 (10th Cir. 1939). This becomes particularly important in the case of embezzlement or theft before the funds to be deposited reach the bank. *Cf. FDIC* v. *Records,* 34 F. Supp. 600, 601-602 (W.D. Mo. 1940); *Peters* v. *United States,* 94 Fed. 127, 146 (9th Cir. 1899).[1]

Another area to be profoundly affected by *Dickinson* is the Federal Reserve System. For one thing, if funds in armored cars are deposits of that bank, they must be counted as deposits for reserve purposes, and yet the computation of such funds under the applicable regulations (12 C.F.R. Pt. 204) would be a virtually impossible task. There are, moreover, other facets of the problem. Federal Reserve banks maintain ac-

[1] FDIC is also required by statute to make banks advertise that they are members of the association (12 U.S.C. § 1228(a)), and its regulations provide that the official sign shall be displayed at each station or window where insured deposits are "usually and normally received," both at the principal place of business and at "all its branches." 12 C.F.R. § 328.1(a). Failure to advertise in this manner results in a fine of $100 a day. Presumably, these requirements would now apply to each armored car and stationary depository.

counts for the member banks of the Federal Reserve System in carrying out their clearing house functions. Under 12 U.S.C. § 360, a Federal Reserve bank is required to "receive on deposit at par from member banks * * * checks and drafts drawn upon any of its depositors." In order to determine the state of any member bank's account at any given time, and therefore the bank's compliance with reserve requirements, it is necessary to determine when the Reserve Bank "received" a particular deposit. In *Pascagoula National Bank* v. *Federal Reserve Bank of Atlanta*, 3 F.2d 465 (N.D. Ga. 1924), *aff'd*, 11 F.2d 866 (5th Cir. 1926), *cert. denied*, 271 U.S. 685 (1927), the member bank argued that it was entitled to immediate credit to its account for checks sent to the Reserve Bank "for collection". The court rejected this contention; it defined "deposit" as meaning a "general deposit in which arises the relation of debtor and creditor, not that of principal and agent." 3 F.2d at 466. A check received "for collection" was not received for deposit, because the debtor-creditor relationship did not arise, under the regulations of the Federal Reserve System, until the expiration of a certain period of time, representing the usual time required to collect on the check. Until then, the Reserve Bank was only the agent of the member bank. "Since * * * credit is to be given at the expiration of the period fixed by the time schedule, whether returns from the check have actually been received or not, at that time, certainly the agency is to cease, and the check is to become and does become the property of the Reserve Bank, and the transaction ripens into a general deposit. The check is then 'received on deposit at par', as required by [12 U.S.C. § 360]." 3 F.2d at 467.

The dislocations that would be created in the banking system if the nature of Federal Reserve Bank deposits were changed would be tremendous, and the very suggestion of a change would loose a deluge of litigation.

Two statutory provisions relating to foreign banking will surely be affected by the Court's ruling. Under 12 U.S.C. § 615(a), corporations organized to engage in foreign banking (Edge Act corporations) are given power "to receive deposits outside of the United States and to receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States."

It is clear that the statute thus makes it of great importance to determine *where* a deposit is received. Edge Act corporations are given unlimited authority (subject, of course, to the rules and regulations of the Federal Reserve Board) to *receive* deposits outside the United States but are severely restricted if the deposits are *received* within the United States. This Court's ruling in *Dickinson* may well have two possible effects. First, it could encourage Edge Act corporations to set up a system of physical delivery of deposits outside the United States, regardless of where the deposits are contractually received, so as to avoid the statutory prescription. Or conversely, contractual provisions now carefully designed to assure that deposits are "received" outside the United States may be attacked and vitiated on the ground that, pursuant to *Dickinson,* physical receipt controls.

The other relevant statutory provision relating to foreign banking is in the very next subsection, 12 U.S.C. § 615(b), which gives Edge Act corporations the power

> To establish and maintain for the transaction of its business branches or agencies in foreign countries, their dependencies or colonies, and in the dependencies or insular possessions of the United States, at such places as may be approved by the Board of Governors of the Federal Reserve System and under such rules and regulations as it may prescribe, including countries or dependencies not specified in the original organization certificate.

As pointed out in the second portion of this Petition, the Federal Reserve Board, as a result of the *Dickinson* ruling, may now have to set new rules and regulation relating to branches, since an entirely new set of such branches may spring into existence dependent upon where physical receipt of deposits is occasioned.

The Court's decision in *Dickinson* may well call for a restructuring of facilities on federal property and a re-evaluation of decisions such as *Texas* v. *National Bank of Commerce,* 290 F.2d 229 (5th Cir.), *cert denied sub nom. Falkner* v. *National Bank of Commerce,* 368 U.S. 832 (1961). In that case, the court was confronted with a situation in which the Secretary of the Treasury had designated two banks as depositories and financial agents of the United States to operate on Air Force bases, pursuant to 12 U.S.C. § 90. Among the functions which the facilities were limited to was "accepting deposits." Texas sought to prohibit the exercise of these powers on the grounds that the Texas Constitution did not permit branches; a Texas statute

provided that no bank could, *inter alia,* "receive deposits except in its own banking house"; and 12 U.S.C. § 36(c) allowed national banks to establish branches only where specifically authorized to do so by state law. The Court of Appeals, despite these arguments, ruled that § 90 gave the Secretary sufficient power to require the banks to operate on military installations. This Court's *Dickinson* ruling, however, will undoubtedly bring the Fifth Circuit's *National Bank of Commerce* decision into question and with it the entire authority of the Secretary to maintain financial facilities on the extensive military installations operated by the United States whenever and wherever such facilities would not be authorized by state law. This is so because § 90, upon which the Fifth Circuit depended, merely allows national banks to "perform all such reasonable duties as may be required of them," whereas this Court has now required § 36(f) to be interpreted in the light of a paramount policy of "competitive equality." The Air Force banks in the *National Bank of Commerce* case would undoubtedly be branches under this Court's ruling, and they would have to bow to the state prohibition.

The *Dickinson* decision will also have a disruptive effect in the field of criminal law. In *Lubin* v. *United States,* 313 F.2d 419 (9th Cir. 1963), for example, two men were convicted of conspiracy to steal property belonging to banks, as defined in 18 U.S.C. § 2113. Actually, the conspiracy was to take money and other property while it was being transported by an independent armored car service. The Court of Appeals reversed the convictions, holding that the conspiracy related to property owned by the armored car serv-

ice and not by the banks.[2] During its discussion, the Court made this highly significant comment:

> There was some discussion between the defendants about three markets and a catering company in the Sherman Oaks and Van Nuys areas, but it hardly rises to the dignity (if we may call it that) of proof of a conspiracy to take money from them, much less to take money belonging to one of the banks from one of Armored's trucks serving them. Two were not being serviced by Armored; *the other two had written contracts with Armored, and these indicate that the property to be transported belonged to Armored's customer, rather than to a bank.* [*Id.* at 422; emphasis added.]

In other words, the Court of Appeals relied upon the contract between the parties to define the status of ownership for purposes of the criminal statute. Quite obviously, such a contractual relationship might well be held inapplicable if this Court's *decision* were to remain in effect. We submit that rights, obligations and liabilities under criminal statutes should not be made subject to such possible misunderstanding or confusion.

But the concept of "branches" and "deposits" is far more complex than these few examples would suggest. These words, and all of the interrelationships

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[2] In a similar case, *United States* v. *Papworth*, 156 F. Supp. 842 (N.D. Tex. 1957), *aff'd*, 256 F.2d 125 (5th Cir.), *cert. denied*, 358 U. S. 854 (1958), the defendant was also indicted for conspiring to rob a banking facility on an Air Force base. He claimed that he could not have robbed a bank or banking institution under 18 U.S.C. § 2113(a) because the facility was a branch bank prohibited by the Texas Constitution and a Texas statute and thus had no valid existence. The court held the facility not to be a branch bank but an arm or agency of the federal government within the meaning of 12 U.S.C. § 90. As in the *Lubin* case, above, this ruling might well be suspect under the reasoning of *Dickinson*.

and legal consequences flowing from them, permeate the entire federal banking scheme. To cite but a few examples:

—Interest rates on deposits in banks, whether members of the Federal Reserve System or state non-member banks, may well depend on the precise time of receipt. See 12 U.S.C. § 1828(g); 12 C.F.R. Pts. 217, 329. Interest or dividend rates on deposits in Federal Home Loan Banks may similarly depend on the time when receipt of the deposits is accomplished. *Cf.* 12 U.S.C. § 1425(b).

—A branch of a building and loan association in the District of Columbia is defined in part as any place other than the principal office "at which accounts are opened or payments thereon are received"—a phrase presumably comparable to "any branch place of business * * * at which deposits are received." 12 U.S.C. § 1464.

—Subject to the approval of the Farm Credit Administration, any federal land bank "may establish branches within the farm credit district" and engage in a number of activities within each branch. 12 U.S.C. § 672.

—At least 25% of that part of the capital of any federal land bank for which stock is outstanding in the name of federal land bank associations may consist of "deposits in member banks" of the Federal Reserve System. 12 U.S.C. § 697.

—The Export-Import Bank of the United States is specifically authorized "to receive deposits" (12 U.S.C. § 635); federal credit unions are given power "to make deposits" (12 U.S.C. § 1757(9)), and no joint-stock

land bank has power "to receive deposits" unless expressly authorized (12 U.S.C. § 814).

What precise impact this Court's *Dickinson* ruling will have on each and all of these provisions and problems it is impossible to say. But one thing is clear. For this Court to have changed the traditional concept of a deposit and of a branch for purposes of § 36(f) will have a profound, far-reaching and as yet incalculable effect on areas of banking law as to which the Court could not have been, but must now be, aware.

2. As pointed out in the amicus brief filed on behalf of The National Association of Supervisors of State Banks (pp. 4-5), twelve states permit unlimited branches, and twenty-three allow branches with restrictions.

The Court in its *Dickinson* decision was directing its attention, due to the facts presented, to a state where branches are forbidden and to receptacles and armored cars which, by virtue of becoming branches under the Court's ruling, would be prohibited services. We respectfully submit that the Court has failed to appreciate the other side of the coin. If armored cars, for example, are branches under § 36, we have the problem not only of banks in legal-branch states operating cars in illegal-branch states, and vice versa, but of branches meeting both federal and state requirements relating to branches where such branches are legal. For if these cars are branches, they must, by law, meet all of the requisites that other, more orthodox, branches must meet. A few examples should suffice to show how impossible this would be:

(a) There is a requirement in 12 U.S.C. § 81 that "the general business" of a bank shall be transacted in the branches established under § 36. The general

business of a bank has been interpreted to include such activities as issuing and cashing Travelers Checks, opening and closing accounts, maintaining savings accounts, selling Government Bonds, making loans, etc. Yet how could depositories and armored cars possibly engage in these activities?

(b) No branch of a national bank can be established "or moved from one location to another" without the consent and approval of the Comptroller. 12 U.S.C. § 36(c).[2] What this means as a practical matter is that the Comptroller must issue a formal certificate[3]

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[2] The Federal Reserve Board and FDIC must give similar approval for operations under their jurisdiction. *E.g.*, 12 U.S.C. § 321; 12 U.S.C. § 1828(d). Whether an entirely new set of rules and regulations applicable to this new breed of "branches" will have to be promulgated is one of the many unanswered questions evoked by the *Dickinson* decision.

[3] This certificate reads:

COMPTROLLER OF THE CURRENCY

Treasury Department Of The United States
Washington, D.C.

WHEREAS, ...
located in ..... State of ..... being a National Banking Association, organized under the statutes of the United States, having made application to the Comptroller of the Currency for his approval of the establishment and operation of a branch at the following location:

AND, WHEREAS, it appears that such establishment and operation are in conformity with the applicable provisions of the statutes of the United States;

NOW, THEREFORE, I hereby certify that the necessary approval is given and that the said association is hereby authorized to establish and operate a branch at the location above mentioned.

IN TESTIMONY WHEREOF, witness my signature and seal of office this ..... day of ..... 19 ....

Charter No. .....
Branch Certificate No. .....

Comptroller of the Currency

to *every* branch. Moreover, the regulations require that the certificate issue for the branch "at the designated location." 12 C.F.R. § 4.5. How the statute and regulations can possibly be made to fit a roving armored car where such cars are legal under state law is impossible to imagine. A car making 400 calls on 100 customers a week, for example, may well require a separate certificate for each car, for each stop or customer, and possibly for each move from one location to another.

(c) Under 12 U.S.C. § 36(d), the aggregate capital of every national banking association "and its branches" may at no time be less than the aggregate minimum capital required of national banking associations as set forth in 12 U.S.C. § 51. Thus, each branch must meet minimum capital requirements—which is an impossibility in the case of depositories and armored cars. There are also minimum capital requirements for branches in 12 U.S.C. § 36(c).

(d) An Act passed by Congress last year required the Comptroller of the Currency, the Federal Reserve Board, the FDIC and the Federal Home Loan Bank Board to promulgate rules establishing minimum standards with which banks and savings and loan associations must comply with respect to the installation, maintenance and operation of security devices and procedures. 12 U.S.C. § 1882(a). These rules have now been promulgated by each of the relevant offices, and they are, with minor exceptions, identical. Typical are the rules of the Comptroller, which appear in 12 C.F.R. 21 and which specifically include a "branch authorized under 12 U.S.C. section 36" within the ambit of their requirements. The rules require, among other things, a lighting system, tamper-resistant locks,

an alarm system, photographic and recording equipment, a schedule for inspection of devices, procedures for removing excess currency, the use of "bait" money, the placing of "all currency, negotiable securities, and similar valuables" in "a locked vault or safe during non-banking hours," the designation of a person to inspect all locations where currency is stored after closing hours, and the keeping of records and filing of reports.

It is quickly obvious that armored cars and stationary depositories are incapable of complying with many of these standards.

(e) As pointed out above, if armored cars and depositories are branches, they must meet the requirements of state as well as federal law. Yet many states have requirements relating to branches that would seem wholly inoperable when applied to these facilities. For example, Michigan has extensive and elaborate provisions dealings with branches, including restrictions on the size of communities as well as counties, findings of public need and convenience, minimum capital requirements, approval of any change in location, minimum mileage restrictions in relation to other banks, etc. One need only visualize an armored car attempting to pick up receipts from toll booths on a turnpike traversing the state to comprehend the incredible legal maze that would envelope it. The car could pick up from booth 1; it could not pick up from booth 2, which is located within the limits of a city having a competing bank, or from booth 3, where no certificate of public convenience and necessity has been issued; it could proceed to booth 4, etc. That this is not a fanciful suggestion is illustrated by *First Citizens Bank and Trust Co.* v. *Camp,* 409 F.2d 1086 (4th

Cir. 1969), where the court held that the Comptroller is bound by "need and convenience" provisions of state laws governing branches.

(f) The Court's holding, if applicable to national banks in every state, could make national banks competitively unequal in the many states where armored car messenger operations are permitted to state banks. In California, for example, state and national banks are required to pick up funds from and deliver them to municipalities and other local governments. Calif. Government Code, § 53739. State law in California and in states permitting armored car operations to state chartered banks does not define such armored cars to be branch banks. Thus, in California a state chartered bank providing such a service need not obtain authorization from the Superintendent of Banks to establish a branch, or provide paid-up-capital of $50,000 to $300,000. See Calif. Banking Code §§ 500, 502 and 380. If, however, armored cars operated by national banks are "branches" in accordance with this Court's opinion, then banks providing such services in California and similar states must obtain the Comptroller's approval to establish a branch and must comply with the minimum capital requirements for establishing branches. See 12 U.S.C. § 36(c). Such a result is fundamentally inconsistent with making national banks competitively equal with state banks, the motivating policy which this Court found behind the McFadden Act.

(g) Although we have here restricted ourselves to the facilities specifically involved in this proceeding—armored cars and depositories—the clear import of the Court's ruling is that many other activities will come within the definition of branches if the Court's ruling

stands. Already, for example, moves are being made to attack the origination of loans by national banks off-premises, a practice long carried on by every major bank—both state and national—in the United States. The Independent Bankers Association of America has taken the position in a letter to the Comptroller of the Currency that such offices are prohibited to national banks, even in states which permit branches, because these offices are "unregulated branch activities without regard to state standards as to public convenience or necessity, or to location * * *." *American Banker,* December 24, 1969, p. 12.

(h) As pointed out in the amicus brief filed by twenty-two national banks, a number of other vital banking services may well come under interdiction by the states if *Dickinson* is allowed to stand. Credit card operations, the financing of new cars through automobile dealers, data processing services, money order sales through bank customers, the signing of trust agreements in law or business offices, the use of collectors for installment loans, and many other such functions that have traditionally been associated with the general business of banking will now become suspect as taking place at locations where "deposits are received, or checks paid, or money lent."

We submit that the Court could not possibly have intended the various results illustrated and synopsized in this Petition, and yet these results are the inescapable next step if the *Dickinson* ruling remains in effect.

WHEREFOR, petitioner respectfully prays that the Court grant a rehearing in the above-entitled cases concerning what the federal definition of "branch" in § 36(f) should be, now that it has been determined that

the definition is a federal one, and reverse the decision and judgment entered in said cases by the Fifth Circuit Court of Appeals.

Respectfully submitted,

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